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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1106~~ 207

L. C. FULLER, JR. LUMBER CO., INC.,
Petitioner,

vs.

CHESTER HERMAN ANGLIN,
Respondent.

L. C. FULLER, JR. LUMBER CO., INC.,
Petitioner,

vs.

MRS. GRACE ROBBINS, ADMINISTRATRIX OF THE ESTATE OF BAILEY ROBBINS, DECEASED,
Respondent.

L. C. FULLER, JR. LUMBER CO., INC.,
Petitioner,

vs.

G. C. MILLIGAN AND JOHN T. RIDGEWAY, D/B/A MILLIGAN & RIDGEWAY FUNERAL HOME,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner, L. C. Fuller, Jr. Lumber Co., Inc. (hereinafter sometimes referred to as defendant), respectfully prays that a writ of certiorari issue to review and

reverse the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled causes, consolidated for appeal, on the 30th day of April, 1957, and represents as follows:

A.

OPINION BELOW.

There was no written opinion of the Court below. The judgment and decision of the Court of Appeals for the Sixth Circuit is found in Appendix attached hereto, page 1. No petition for rehearing was filed.

B.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Title 28, USCA, Section 1254(1) and Rule 19(b) of the Rules of this Court, to:

(1) Resolve the conflict between the decisions of the Court of Appeals for the Sixth Circuit in these causes, and the decision of the Court of Appeals for the 7th Circuit in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe* (1955, 7th Cir.), 220 Fed. (2) 299, 304, and the decision of the Court of Appeals for the 4th Circuit in *Southern Railway Company* v. *Madden* (1956, 4th Cir.), 235 Fed. (2) 198, on the same matter, and,

(2) Reverse the decision of the United States Court of Appeals for the 6th Circuit which has decided a federal question in a manner in conflict with the applicable decisions of this Court in *Norwood* v. *Kirkpatrick* (1955), 349 U. S. 29, 99 L. Ed. 789, and *Gulf Oil Corporation* v. *Gilbert* (1947); 330 U. S. 501, 508, 91 L. Ed. 1055, relating to the transfer of civil actions for the convenience of parties and

witnesses, in the interest of justice, under the provisions of Title 28, USCA, Section 1404(a):

(a) Date of Judgment Sought to Be Reviewed.

The judgment of the United States Court of Appeals for the 7th Circuit was entered on April 30, 1957 (Appendix hereto, page 1). There was no petition for rehearing and no extension of time within which to petition for rehearing.

(b) Statutory Provision Conferring Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, USCA, Section 1254(1).

C.

QUESTION PRESENTED FOR REVIEW.

Was the denial of the transfer of the causes in the Trial Court for the Middle District of Tennessee, the state of plaintiffs' residence, to the Southern District of Indiana where the cause of action arose and all of the conduct complained of occurred, so clearly erroneous as to amount to an abuse of discretion on the part of the Trial Judge, requiring a reversal of the Trial Judge for denying the transfer.

D.

STATUTES INVOLVED.

Title 28, USCA, Section 1404(a), provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. * * *"

Title 28, USCA, Section 1391(a), provides:

> "(c) Any corporation may be sued in any judicial district in which it is incorporated or licensed to do

business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

E.

A CONCISE STATEMENT OF THE CASE CONTAINING FACTS MATERIAL TO THE QUESTION PRESENTED.

The three (3) causes of action below present identical questions of law with respect to the denial of the District Judge of the defendant's motion to transfer. The causes were consolidated for trial in the lower court and on appeal for the purposes of briefs, appendix thereto, argument and decision.

The actions involved claims for personal injury, wrongful death and property damage, growing out of an accident or collision occurring in the Southern District of the State of Indiana, near Oakland City, Indiana. The petitioner and defendant below is an Alabama corporation doing business in Indiana and was amenable to process and suit in the United States District Court for the Southern District of Indiana, Evansville Division, pursuant to Title 28, USCA, Section 1391(c). The plaintiffs were all residents of Tennessee, and brought the actions in the State Court of Tennessee, which were removed to the United States District Court for the Middle District of Tennessee, at Nashville.

All of the conduct complained of by the plaintiffs occurred in Indiana. There was no controverted question with respect to the conduct of the parties which depended upon any event occurring in Tennessee, the forum selected by the plaintiffs. All the parties with respect to their substantive rights, were required to rely upon evidence of events entirely removed from that forum.

Except for the drivers of the two vehicles involved in the accident, all of the witnesses testifying to the events

leading up to and at the time of the accident were residents of the vicinity of the accident in Indiana, thirty-one (31) miles from the site of the United States District Court for the Southern District of Indiana and one hundred ninety-seven (197) miles from the site of the United States District Court for the Middle District of Tennessee. None of such witnesses were amenable to compulsory process for attendance at the trial. The cost of procuring the attendance of witnesses at the trial in the Middle District of Tennessee was substantially greater than the cost for producing such attendance in the Southern District of Indiana. A view of the *locus in quo* by the jury, which was of importance in the trial, could reasonably be had only if the case were tried in the Southern District of Indiana. Of the medical witnesses who treated one of the parties who was also a driver of one of the vehicles involved, one doctor was a resident of the county in Indiana where the accident occurred and the other who saw the plaintiff upon his return home, was a resident of Clarksville, Tennessee.

The jurisdiction of the United States District Court in the first instance was based upon diversity of citizenship and jurisdictional amount. The plaintiffs were all residents of Tennessee and the defendant was an Alabama corporation, qualified to do business in Tennessee and doing business in the State of Indiana.

F.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The United States Court of Appeals for the Sixth Circuit has held in the cases at bar that the Trial Judge did not abuse his discretion in denying transfer from the Middle District of Tennessee to the Southern District of Indiana. This ruling was made on the basis of the following pertinent facts:

The accident giving rise to the actions for personal injuries, wrongful death and property damage occurred in Indiana and the substantive rights of the parties with respect to the question of liability and with respect to the bringing of a wrongful death action and other pertinent questions were governed by the laws of Indiana; the *locus in quo* was one hundred ninety-seven (197) miles from the site of the Court in the Middle District of Tennessee at Nashville and only thirty-one (31) miles from the location of the Court in the Southern District of Indiana at Evansville; the plaintiffs were all residents of Tennessee and the defendant was a resident of Alabama and amenable to process and suit in Indiana where it was doing business as well as in Tennessee where it was qualified; with the exception of the plaintiff Anglin, a resident of Tennessee, driver of one of the vehicles involved, and the defendant's driver, a resident of Alabama, all witnesses to the events leading up to and at the time of the accident were from the immediate locale of the accident and were all residents of Indiana; the one medical witness who treated the plaintiff Anglin while hospitalized in Gibson County, Indiana, was a resident of the same county, *i. e.*, Gibson County, where the accident occurred; and the other medical witness who testified for the plaintiff Anglin by deposition, was a resident of Clarksville, Tennessee and his testimony related to treatment and observation of the plaintiff after he returned to his home. Except for the plaintiff Anglin, all of the witnesses from Tennessee produced evidence relating to damages, events following the accident or relating to the reputation of the plaintiff Anglin for sobriety.

The convenience of witnesses could only be served by a trial of the cause in the Southern District of Indiana. In the interest of justice; the relative ease of access to sources of proof; availability of compulsory process for the attendance of unwilling and the cost of obtaining attendance

of willing witnesses; the possibility of a view of the premises; and the appropriateness of having a trial in a diversity case in a forum at home with the state law governing the case, demonstrated conclusively that a transfer of the causes should be made to the District Court for the Southern District of Indiana.

Conflict With the Decisions of the 7th and 4th Circuits.

The United States Court of Appeals for the 7th Circuit in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe* (1955), 220 Fed. (2) 299, 304, held that a denial of transfer was so erroneous as to constitute an abuse of discretion on the part of the Trial Court denying a motion to transfer a death action from Illinois to Iowa, where an administratrix chose a state court in Illinois as a forum for a death occurring in Iowa where all of the witnesses to the event resided.

The United States Court of Appeals for the 4th Circuit in *Southern Railway Company* v. *Madden* (1956), 235 Fed. (2) 198, held that a denial of transfer was so erroneous as to constitute an abuse of discretion where a personal injury occurred in Charlotte, North Carolina, and witnesses to the occurrence and hospital treatment lived there except one who had moved to West Virginia and where the view of the *locus in quo* would be of importance in trying the case.

Each of the decisions of the two circuits mentioned above gave recognition to the factors under Title 28, USCA, Section 1404(a), which are to be considered by the federal judiciary, in passing upon the right of a party to transfer under the provisions of that Statute.

In conflict with the decisions of the 7th and 4th Circuits as noted above, the United States Court of Appeals for the 6th Circuit in the cases at bar held there was no abuse of

discretion by the Trial Judge where the facts relative to transfer were practically identical. It is apparent that the United States Court of Appeals for the 6th Circuit approved the reasoning of the Trial Judge in according a large measure of deference to the plaintiffs' freedom to select their own forum even though had minimal value whereas in the cases at bar none of the conduct complained of occurred in the forum selected by the plaintiffs.

Conflict With Applicable Decisions of This Court.

The decision of the United States Court of Appeals for the 6th Circuit in holding that the Trial Judge did not abuse his discretion in denying transfer in the cases at bar, is in conflict with the applicable decisions of this Court in that the governing tests and the correct guides to their application to be followed by the federal judiciary in construing Section 1404(a) and in evaluating the evidence pertinent thereto, were disregarded or misinterpreted, there being no factual basis for the Trial Judge's conclusion not to transfer.

Mr. Justice Minton, speaking for this Court in *Norwood v. Kirkpatrick* (1955), 349 U. S. 29, 99 L. Ed. 789, in pointing up the difference between the old *forum non conveniens* doctrine and Section 1404(a) said:

> "* * * The harshest result of the application of the old doctine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

The factors which ought to be considered by a federal forum in applying the provisions of Title 28, USCA, Section 1404(a) are those enumerated by Mr. Justice Jackson in *Gulf Oil Corporation v. Gilbert* (1947), 330 U. S. 501, 508, 91 L. Ed. 1055, in applying the doctine of *forum non conveniens* prior to the enactment of Section 1404(a). Mr. Justice Jackson said:

> "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. * * *."

While the plaintiffs' choice of forum is to be considered, Mr. Justice Jackson, with respect to that phase of the subject, said:

> "* * * It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only.

> There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

The 7th Circuit in *Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe* (1955, 7th Cir.), 220 Fed. (2) 299, 304, and the 4th Circuit in *Southern Railway Company* v. *Madden* (1956, 4th Cir.), 235 Fed. (2) 198, correctly followed the guides to the application of the tests set forth in Section 1404(a) in holding there was an abuse of discretion in denying transfer. The United States Court of Appeals for the 6th Circuit in holding to the contrary, is an important decision, not only in conflict with the decisions of the 7th and 4th Circuits but also in conflict with the pronouncement of this Court on the subject.

If the Trial Court's discretion has been broadened by Section 1404(a) as stated by this Court in *Norwood* v. *Kirkpatrick* (1955), 349 U. S. 29, 99 L. Ed. 789, without any change in the relevant factors to be considered, it seems clear that the federal judiciary has been afforded a new standard in interpreting Section 1404(a), to the extent at least that the remedy available thereunder shall be granted upon a lesser showing of inconvenience, eliminating the requirement of demonstrating a strong balance in favor of a defendant requesting transfer. The strong balance rule was applied by the District Court in the cases at bar and approved by the United States Court of Appeals for the 6th Circuit in its affirmance of the District Court's decision.

In recognition of the governing tests and the correct guides to their application, the cases at bar clearly called for transfer to Indiana forum.

(a) The Private Interest of the Litigant.

This has minimal value where none of the conduct occurred in Tennessee, the plaintiffs' choice of forum.

(b) The Relative Ease of Access to Sources of Proof.

This is conclusively demonstrated by the distance from the *locus in quo* where the witnesses to the important events resided, to the Middle District of Tennessee as compared to the Southern District of Indiana.

(c) The Availability of Compulsory Process for the Attendance of Unwilling Witnesses.

None of the witnesses who could testify concerning the events leading up to and at the time of the accident with the exception of one of the two drivers involved, could be compelled to travel to the Middle District of Tennessee. Compulsory process was not available to either of the parties for the attendance of those witnesses.

(d) The Cost of Obtaining Attendance of Willing Witnesses.

Because of the difference in the distance involved and the time required for the trial of the causes, the cost of procuring the attendance of witnesses in the Middle District of Tennessee, was considerably greater than the cost of procuring their attendance in the Southern District of Indiana.

(e) The Possibility of View of the Premises If Appropriate.

The possibility of a view of the scene of the accident was practically foreclosed by a trial in the Middle District of Tennessee whereas upon transfer to the Southern District of Indiana a view of the scene of the accident would be had with a minimum of expense in time and money.

(f) All Other Practical Problems That Make the Trial of a Case Easy, Expeditious and Inexpensive.

Not only was there an appropriateness in having the trial of the cases at bar in a forum at home with the state law which must govern rather than having a Court in the Middle District of Tennessee untangle problems in conflicts of law and in law foreign to itself, but another practical problem arises by reason of the necessity of submitting testimony of unwilling witnesses by way of deposition. In view of the substantial damages sued for in the three actions involved, it was not in the interest of justice that the parties would be required to forego presenting their witnesses orally to deliver their testimony with the consequent opportunity for observation by judge and jury of those attributes which the law of experience of the ages declares may afford a proper guide in determining credibility. In a very real sense, the interest of justice requires that the parties be afforded the opportunity of presenting their witnesses orally.

The burden of a jury trial should not be imposed upon the Middle District of Tennessee, an area having no relation to the litigation other than the presence of the parties plaintiff.

While the standards to be followed by the federal judiciary in construing Section 1404(a) may be incapable of precise definition, the relevant factors to be considered have been precisely defined. Unless the federal judiciary is required to observe those factors which in this instance compelled the exercise of the power to transfer, litigants are to be denied the remedy of transfer under Section 1404(a) which as this Court has said in *Norwood* v. *Kirkpatrick* (1955), 349 U. S. 29, 99 L. Ed. 789, is available upon a lesser showing of inconvenience. If the discretion to be exercised by the Trial Judge has been broadened, a denial

of transfer, upon a showing of substantial compliance with all of the relevant factors recognized by this Court as the correct guides in applying the tests of Section 1404(a) does not constitute the sound exercise of such discretion and the decision of the United States Court of Appeals for the 6th Circuit holding there has been no abuse of discretion by the Trial Judge in the instant cases, denies the defendant the remedy available to it under Section 1404(a) and is in conflict with this Court's pronouncement in *Norwood* v. *Kirkpatrick* (1955), 349 U. S. 29, 99 L. Ed. 789. It is submitted that the rule "* * * unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should be rarely disturbed * * *" is no longer in effect since the *Norwood* decision and unless the federal judiciary is so advised by way of a clear cut application of the standard established in the *Norwood* decision, the rights of litigants to relief under Section 1404(a) are without meaning. The lower Federal Courts should be required to give definite emphasis to the factors determining the availability of the remedy under Section 1404(a) and require less of a showing of "abuse of process", while being more willing to grant relief on a showing of inconvenience and the plaintiff's choice of forum should be afforded minimal value where the other factors are clearly demonstrated in favor of transfer.

WHEREFORE, your Petitioner, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the 6th Circuit entered by that Court in these causes on April 30, 1957, and that the said final judgment be reversed by this Honorable Court and the causes transferred to the United States District Court for the Southern District of Indiana for

a new trial and that your Petitioner may have such other and further relief as this Honorable Court may deem proper.

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Petitioner,

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APPENDIX.

Nos. 13,057, 13,058, 13,059.

UNITED STATES COURT OF APPEALS,

FOR the Sixth Circuit.

L. C. FULLER, JR., LUMBER CO., INC.,
Appellant,

vs.

CHESTER HERMAN ANGLIN,
Appellee.

L. C. FULLER, JR., LUMBER CO., INC.,
Appellant,

vs.

MRS. GRACE ROBBINS, Administratrix of the Estate of BAILEY ROBBINS, Deceased,
Appellee.

L. C. FULLER, JR., LUMBER CO., INC.,
Appellant,

vs.

G. C. MILLIGAN AND JOHN T. RIDGEWAY, d.b.a. MILLIGAN & RIDGEWAY FUNERAL HOME,
Appellees.

ORDER.

Before MARTIN, MCALLISTER and STEWART, *Circuit Judges.*

These consolidated appeals grow out of a head-on collision between a trailer truck and a hearse, which occurred in Indiana in 1954. Trial was had in the Middle District of Tennessee, the residence of appellees, resulting in verdicts in their favor against the appellant truck owner, a corporation domiciled in Alabama.

The appellant complains of the district court's failure to grant its motion to transfer the actions to the Southern District of Indiana in accordance with 28 U.S.C.A. § 1404(a), and of several alleged errors committed by the court before and during the trial.

The question of whether to transfer the actions to Indiana was one entrusted to the district court's discretion, of which there was no abuse under the circumstances disclosed by the record. After careful examination of the other matters raised by able counsel for the appellant, we are unable to conclude that either alone or in combination any of them constituted prejudicial error affecting substantial rights.

The judgments of the district court are accordingly affirmed. Approved for entry:

/s/ POTTER STEWART,
United States Circuit Judge.

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IN THE

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OCTOBER TERM, 1956.

No. [redacted] 207

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
CHESTER HERMAN ANGLIN,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
MRS. GRACE ROBBINS, Administratrix of the Estate of Bailey Robbins, Deceased,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
G. C. MILLIGAN and JOHN T. RIDGEWAY, D/B/A MILLIGAN & RIDGEWAY FUNERAL HOME,
Respondent.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Rule 19 (b) of the Rules of the Supreme Court of the United States 2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 1106.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
CHESTER HERMAN ANGLIN,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
MRS. GRACE ROBBINS, Administratrix of the Estate of Bailey Robbins, Deceased,
Respondent.

L. C. FULLER, JR., LUMBER CO., INC.,
Petitioner,
vs.
G. C. MILLIGAN and JOHN T. RIDGEWAY, D/B/A MILLIGAN & RIDGEWAY FUNERAL HOME,
Respondent.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MAY IT PLEASE THE COURT:

Petitioner, the L. C. Fuller, Jr., Lumber Co., Inc., seeks the issuance of a writ of certiorari to review a judgment entered by the United States Court of Appeals for the Sixth Circuit, which judgment sustained the judgments of the United States District Court for the Middle District of Tennessee entered on jury verdicts in two personal injury suits and one property damage suit, all growing out of a motor vehicle accident. In affirming the judgments of the lower court, the United States Court of Appeals for the

Sixth Circuit affirmed the trial court's exercise of discretion in refusing to transfer the said three suits from the United States District Court in Tennessee (the State where all of the plaintiffs resided) to the District Court in Indiana. It is the action of the Court of Appeals for the Sixth Circuit, in affirming the said exercise of discretion by the trial court in refusing to transfer said cases pursuant to **Title 28, U. S. C. A., Section 1404 (a)**, that is sought to be reviewed by the petition in this matter.

OPINION BELOW.

There was no written opinion in the Court of Appeals for the Sixth Circuit. The judgment and order of the Court of Appeals for the Sixth Circuit is found in the Appendix attached to the petition for writ of certiorari filed by defendant. The trial court's statement and opinion, in declining to transfer these three cases from the State of the plaintiffs' residence to the State of Indiana, is found in Appellant's Appendix below at pages 62a, 63a, 64a and 65a.

JURISDICTION OF THIS COURT.

Petitioner seeks to invoke the jurisdiction of this Court under **Title 28, U. S. C. A., Section 1254 (1)** and **Rule 19 (b)** of the Rules of this Court, on the purported grounds that the decision of the Court of Appeals for the Sixth Circuit conflicts with the decisions of the Court of Appeals for the Seventh Circuit and the Fourth Circuit, and on the further ground that the decision of the Court of Appeals for the Sixth Circuit in these causes is in conflict with applicable decisions of this Court. **Norwood v. Kirkpatrick** (1955), 349 U. S. 29, 99 L. Ed. 789, and **Gulf Oil Corporation v. Gilbert** (1947), 330 U. S. 501, 508, 91 L. Ed. 1055.

It is respectfully submitted that the question presented by Appellant's petition merely relates to a matter of the

exercise of discretion by the trial court and the affirmance of that exercise of discretion by the Court of Appeals for the Sixth Circuit, that the issues in the case *sub judice* are not similar to the facts involved in the decision of the Court of Appeals for the Seventh Circuit (**Chicago, Rock Island and Pacific Railroad Co. v. Igoe** [1955, 7th Cir.], 220 Fed. [2] 299, 304), or the decision of the Court of Appeals for the Fourth Circuit (**Southern Railway Company v. Madden** [1956, 4th Cir.], 235 Fed. [2] 198), and that the facts in the cases *sub judice* are not at all similar or in conflict with the decision of the Supreme Court in the cases cited hereinabove. Questions involving an exercise of discretion on the facts involved depend upon the facts in each particular case, and the ultimate ruling on that point, involving the exercise of discretion, can rarely, if ever, be dignified as constituting a decision on a question of law in conflict with other applicable or similar decisions.

STATEMENT OF THE CASE.

The plaintiff, Chester Herman Anglin (Civil Action No. 2010), is a citizen of the State of Tennessee and a resident of Dover, Tennessee (Appellant's App. below, p. 12a). The plaintiff, Mrs. Grace Robbins (Civil Action No. 2011), is a citizen of the State of Tennessee and a resident of Paris, Henry County, Tennessee (Appellant's App. below, p. 55a). The plaintiffs, C. C. Milligan and John T. Ridgeway (Civil Action No. 2012), are residents of Paris, Henry County, Tennessee.

The only two surviving eyewitnesses to the accident were the plaintiff, Chester Herman Anglin, a resident of Tennessee, and Earl Campbell, who resided in Haleyville, Alabama (Appellant's App. below, p. 52a).

The plaintiff's doctor, who treated Anglin upon his return from Indiana, was a resident of Tennessee (Appellant's App. below, p. 52a).

The affidavits filed in opposition to the defendant's motion to transfer these cases to Indiana further pointed out that the witnesses who would testify to establish the ownership of the combination hearse-ambulance which was destroyed in the accident and the extent of the damage thereto, were residents of Tennessee (Appellant's App. below, p. 53a).

The defendant, L. C. Fuller, Jr., Lumber Company, was an Alabama corporation, and was duly qualified to do business in the State of Tennessee and had a duly appointed agent for the service of process in Nashville, Davidson County, Tennessee (Appellant's App. below, p. 54a).

In addition to the above residents of Tennessee, who were named as witnesses in the affidavits filed in opposition to the defendant's motion, there were a substantial

additional number of residents of Tennessee who did, in actuality, testify at the trial.

In the affidavit filed by the defendant's counsel, in support of defendant's motion to have the cases transferred to the Indiana District, while it is averred that sixteen witnesses that would testify in the case, all lived in Indiana, the names of these witnesses were not listed and it was not stated in said affidavit what the substance of their proposed testimony would be or wherein same would be material (Appellant's App. below, pp. 33a, 37a, and 41a). The trial court, after hearing extended argument on defendant's motion, denied said motion to transfer the case to the Indiana District Court, and stated his reasons in some detail for such denial:

"* * * *

"That right to select the forum of the trial is deemed to be a very important right and one which should not be interfered with in the absence of strong and compelling reasons.

* * * * * * * *

"The inference is rather strong from the affidavits and from the record as a whole that at least a considerable number of these 16 witnesses would be cumulative. Possibly a good number of them would be witnesses to the scene of the accident and the conditions which obtained at the scene of the accident after the accident occurred, although possibly some few of them might know something about the operation of the vehicle sometime prior to the occurrence.

* * * * * * *

"On the whole, it appears to the Court that balancing the factor of the number of witnesses involved, the witnesses from Indiana and the witnesses from Tennessee, that probably the matter is substan-

tially equal, the inconvenience would be substantially equal; * * *"

* * * * * * *

"So on the whole case, balancing all the factors involved and considering all of them, the Court feels that there has not been a sufficient showing made to cause the Court to exercise its discretion to transfer the case from this court to the federal court in Indiana. That being true, the Court will have to deny the application." (Appellant's App. below, pp. 62a, 63a and 65a).

ARGUMENT.

The statute invoked by the defendant **[Title 28 USCA, Section 1404 (a)]** merely provides that the District Court "may transfer any civil action" for the convenience of the parties and witnesses.

Certainly the right of a plaintiff to choose his forum is a substantial right. **Sun Oil Co. v. Lederle et al.**, 199 F. 2d 423 (CCA 6).

The venue privilege of a plaintiff is a very substantial factor which is to be given consideration and weight in balancing the conveniences between the parties. **Duffy v. U. S.** (District Court, New York), 114 F. Supp. 881. See also, **International Union of Electrical, Radio & Machine Workers, CIO, et al. v. United Electrical, Radio and Machine Workers of America et al.**, 192 F. 2d 847; **Robbins Music Corp. et al. v. Alamo Music, Inc., et al.** (District Court of New York), 119 F. Supp. 29; and **Strypek v. Schreyer et al.** (District Court of New York), 118 F. Supp. 918.

This is particularly true when the forum selected by the plaintiffs is the State in which they reside.

Section 1404 (a) confides to the District Court a wide discretion, and Appellate Courts will not make a *de novo* decision on the subject or substitute its discretion for that of the trial judge. **Schoen v. Mountain Producers Corp.** (CCA 3), 170 F. 2d 707.

The trial judge's exercise of discretion with respect to these motions to transfer will not be disturbed by the appellate courts "except for a clear abuse of discretion." **Hobson v. Hobson** (CCA 5), 221 F. 2d 839; **International Union of Electrical, Radio & Machine Workers, CIO, et al. v. United Electrical, Radio and Machine Workers of America et al.**, 192 F. 2d 847.

In addition, it has been held that an affidavit filed in support of a motion of this type is fatally defective if

the said affidavit does not list the names of the witnesses who allegedly live in other States or Districts, and does not state the nature and materiality of their proposed testimony. **Strypek v. Schreyer et al.** (District Court of New York), 118 F. Sup. 918; **Goodman v. Southern Railway Co.** (U. S. D. Ct., N. Y.), 99 F. Supp. 852.

Affidavits of the defendant's attorneys were filed in support of defendant's motion to transfer said causes, and said affidavits were identical in all these cases. Said affidavits did not name the witnesses or state what the witnesses in Indiana would testify to, but merely asserted that there were sixteen witnesses who resided in Indiana and who would "likely be called upon to testify" (Appellant's App. below, pp. 33a, 34a).

Here we have a case where all of the plaintiffs, four in number, reside in Tennessee; the defendant is an Alabama corporation; where there are only two surviving eye witnesses, one of whom lived in Tennessee and the other in Alabama; nevertheless, the defendant was insisting that the case be removed to the State of Indiana. It is submitted that it would have been a great hardship upon the Tennessee plaintiffs to have caused them to go to the expense and great inconvenience of trying these cases in the State of Indiana.

There Was No Conflict With the Decisions of the Seventh and Fourth Circuits.

The petitioner contends that the decision of the Circuit Court of Appeals for the Sixth Circuit in these cases was in conflict with the decision of the United States Court of Appeals for the Seventh Circuit, in the case of **Chicago, Rock Island and Pacific Railroad Co. v. Igoe**, supra, and the decision of the United States Court of Appeals for the Fourth Circuit, in the case of **Southern Railway Company v. Madden**, supra.

In the first place, it is respectfully contended that questions involving the exercise of a sound discretion of the

trial court, must each be considered in the light of the exact facts and circumstances existing in that particular case, and, therefore, could hardly be considered as being in conflict with the decisions of another Circuit, involving different facts and different circumstances. To further illustrate our contention in this respect, we point out that the facts involved in the decision of the Seventh Circuit Court of Appeals, and the facts involved in the decision of the Fourth Circuit Court of Appeals, are vastly different from those involved in the three causes *sub judice*.

In the case of **Chicago, Rock Island and Pacific Railroad Co. v. Igoe**, supra, not only did the accident occur in the State of Iowa, and all of the witnesses lived in the State of Iowa, but, in addition, the plaintiff was a resident of Iowa, and was appointed as administratrix of the estate of the deceased (it was a suit for wrongful death), by the courts of Iowa, yet, nevertheless, the suit was instituted, at the plaintiff's election, in the State of **Illinois**. In that case the question of a transfer to the Iowa court, and the refusal of the trial judge to so order a transfer from the State of Illinois to the State of Iowa, was raised in a mandamus action prior to the actual trial. The defendant made a strong showing that if the actual trial took place in Illinois that it would be compelled to go to tremendous expense to transport all the witnesses to Illinois, and, furthermore, that it might well be deprived of the testimony, in open court, of a number of witnesses because of their inability to compel them to appear in Illinois. In the cases *sub judice*, the trial has already taken place and been completed. There is no showing or contention that any material witness for the defendant refused to come to the State of Tennessee. Certainly any inconvenience or expense that is involved would be doubled by a new trial.

In the case of **Southern Railway Company v. Madden**, supra, it was shown that the plaintiff lived as near Charlotte, North Carolina, where the accident occurred and

where all but one of the witnesses resided, as he did to Columbia, South Carolina, where the action was instituted on the plaintiff's choice. The Court pointed out at some length that the only party's convenience that was served by having the case brought in Columbia, South Carolina, was the attorney for the plaintiff. Furthermore, in that case it appeared that a view of the *locus in quo* would be of importance in trying the case. But, in the cases involved in this petition, it is undisputed that the accident occurred on a perfectly straight stretch of road, and that the view was unobstructed for a long distance in each direction. It is inconceivable that either party, in these cases, would have requested, or if either party had requested, that the Court would have granted a motion to permit the jurors to inspect the scene of the accident, which, in any event, would have been some distance from the Indiana court, where the cases would have been tried.

The Decision of the Court of Appeals For the Sixth Circuit Is Not in Conflict With Applicable Decisions of This Court.

We see nothing whatsoever inconsistent between the statements of Mr. Justice Minton in the case of **Norwood v. Kirkpatrick**, supra, or that of Mr. Justice Jackson in **Gulf Oil Corporation v. Gilbert**, supra, and the factors obviously given consideration by the trial judge in these cases under consideration, in exercising his discretion as the trial judge. Mr. Justice Minton summed up the holdings in both of those cases by the following statement:

> "This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

In the first place, in the cases involved in this petition, the plaintiffs did not leave the State of their residence and seek a foreign forum. The suits were instituted in the States in which they resided.

In the second place, the defendant's petition is based upon the erroneous assumption that the trial judge found, upon considering all of the circumstances and facts, that the balance of convenience of the parties and the witnesses strongly favored Indiana as a situs of the actual trial, but that this strong balance of convenience was nullified merely because the plaintiffs elected to sue in the State of Tennessee. That is not correct. The Court found that the balance of convenience was "substantially equal," as shown by the following statement of the trial court (Appellant's Appendix below, p. 63a):

> "On the whole, it appears to the Court that balancing the factor of the number of witnesses involved, the witnesses from Indiana and the witnesses from Tennessee, that probably the matter is substantially equal, the inconvenience would be substantially equal: . . .
>
> * * * * * * *
>
> "So on the whole case, balancing all the factors involved and considering all of them, the Court feels that there has not been a sufficient showing made to cause the Court to exercise its discretion to transfer the case from this court to the federal court in Indiana:"

Primarily, the purpose of transferring the trial of a case to another jurisdiction is for the convenience of the witnesses and the parties, to eliminate excessive expenses and to avoid the possibility that a party may be deprived of having a witness in open court because of the unwillingness of a witness to appear in another jurisdiction. These three cases have already been tried. The record shows that it was a lengthy case involving a number of days. There is no suggestion or contention that the defendant was deprived of having in open court, in Tennessee, any material witness. In fact, the record shows that apparently the defendant had no difficulty in bringing to the State of Tennessee the witnesses it desired to introduce at the trial. To require that these matters be

tried a second time, in the State of Indiana, would serve no convenience to any party or any witness, and serve to save no expense to any party, but, on the other hand, it would only serve to double the inconvenience and expense of all concerned.

CONCLUSION.

It is respectfully contended that the question submitted by the petition for certiorari was a matter for the exercise of sound discretion by the trial judge, that the trial judge's exercise of that discretion was obviously sound, and that the Court of Appeals for the Sixth Circuit did not err in affirming his action in that respect. Certainly it could not be contended that it clearly appears from this record that the trial court abused its discretion in this respect. No legal question is really involved here. To grant this certiorari would be to open the doors to thousands and thousands of cases involving a Trial Court's exercise of discretion upon thousands and thousands of different combinations of different facts and circumstances existing in each case.

It is therefore, the contention of Respondents that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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